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OFFICE OF PETITIONS

In re Application of :
Patrick J. WALSH :
Application No. 10/686,553 : ON PETITION
Filed: October 14, 2003 :
Attorney Docket No. 8285-00646 :

This is a decision on

(1) the petition under 37 CFR 1.181 (no fee) requesting withdrawal of the holding of abandonment in the above-identified application;

(2) the petition under the unavoidable provisions of 37 CFR 1.137(a) to revive the above-identified application; and

(3) the petition under the unintentional provisions of 37 CFR 1.137(b) to revive the above-identified application.

These three petitions were filed concurrently on August 18, 2008.

The petition under 37 C.F.R. 1.181 is **DISMISSED**, the petition to revive under 37 C.F.R. 1.137(a) is **DISMISSED**, and the petition to revive under 37 C.F.R. 1.137(b) is **DISMISSED**.

This application became abandoned for failure to timely pay the issue and publication fees on or before June 16, 2008, as required by the Notice of Allowance and Fee(s) Due, mailed March 14, 2008. Accordingly, the date of abandonment of this application is June 15, 2008.

Withdraw the Holding of Abandonment

Any request for reconsideration of this decision should be filed within two (2) months from the mail date of this decision. *Note* 37 CFR 1.181(f). The request for reconsideration should include a cover letter and be entitled as a "Renewed Petition under 37 CFR 1.181 to Withdraw the Holding of Abandonment."

Petitioner asserts that the Notice of Allowance, mailed March 14, 2008, was not received.

A review of the written record indicates no irregularity in the mailing of the Notice, and, in the absence of any irregularity, there is a strong presumption that the Notice was properly mailed to the practitioner at the address of record. This presumption may be overcome by a showing that the Notice was not in fact received. In this regard, the showing required to establish the failure to receive the Notice must consist of the following:

1. a statement from practitioner stating that the Notice was not received by the practitioner;
2. a statement from the practitioner attesting to the fact that a search of the file jacket and docket records indicates that the Notice was not received; and
3. a copy of the docket record where the nonreceived Notice would have been entered had it been received must be attached to and referenced in the practitioner'statement.

See MPEP § 711.03(c) under subheading "Petition to Withdraw Holding of Abandonment Based on Failure to Receive Office Action," and "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 Official Gazette 53 (November 16, 1993).

The petition fails to satisfy all of the above-stated requirements. In this regard, petitioner does state that the Notice was not received and does attest to the fact that a search of the docket logs and file history indicates that no record in the possession of the undersigned attorney indicates that a Notice was received and provides copies of an incoming log, an action log and a file jacket which is helpful. However, this alone is not sufficient. The showing required must include a statement from the practitioner describing the docketing system and indicating that the docketing system is sufficiently reliable. *See* MPEP § 711.03(c), I, A. The petition does not describe the docketing system or establish its reliability.

Moreover, a copy of the practitioner's record(s) required to show non-receipt of the Notice should include the master docket for the firm. That is, if a three month period for reply was set in the nonreceived Notice, a copy of the master docket report showing all of the replies docketed for a date three months from the mail date of the nonreceived Notice must be submitted as documentary proof of nonreceipt of the Notice. If no such master docket exists, practitioner should so state and provide other evidence such as, but not limited, the following: the application file jacket; incoming mail log; calendar; reminder system; or the individual docket record for the application in question.

Accordingly, absent the required evidence to establish nonreceipt of the Notice of Allowance Fee, the petition requesting withdrawal of the holding of abandonment cannot be granted at this time.

Revive, Unavoidable Delay

Any request for reconsideration of this decision should be filed within two (2) months from the mail date of this decision. *Note* 37 CFR 1.181(f). The request for reconsideration should include a cover letter and be entitled as a "Renewed Petition under 37 CFR 1.137(a) to Revive Unavoidably Abandoned Application."

In regard to the "unavoidable" standard applied by the U.S Patent and Trademark Office, petitioner should note that decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

> The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912)(quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Although the agency of mail was relied upon in this instance, the evidence of record fails to establish that the mail was the source of the lack of timely reply to the Notice of Allowance. As noted above in regard to the petition to withdraw the holding of abandonment, a review of the written record indicates no irregularity in the mailing of the Notice, and, in the absence of any irregularity, there is a strong presumption that the Notice was properly mailed to the practitioner at the address of record. The record also does not describe the docketing system or establish its reliability, which would address the possibility that the Notice was received but not properly docketed, or received and properly docket in a record lost or misplaced, i.e. "no longer in the possession of the undersigned attorney".

As is well established, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987). Here, since the evidence of record is insufficient to establish that the delay was unavoidable, the petition requesting the revival of the application due to unavoidable delay cannot be granted at this time.

Revive, Unintentional Delay

Any request for reconsideration of this decision should be filed within two (2) months from the mail date of this decision. Note 37 CFR 1.181(f). The request for reconsideration should include a cover letter and be entitled as a "Renewed Petition under 37 CFR 1.137(a) to Revive Unintentionally Abandoned Application."

A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the required reply in the form of payment of the issue fee of $1440 and the publication fee of $300, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(d). Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Director may require additional information. See MPEP 711.03(c)(II)(C) and (D). The present petition lacks item (3).

37 CFR 1.137(b)(3) requires a statement that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional." In regard to this statement of unintentional delay, the person making such statement of unintentional delay should be in a position to have firsthand or direct knowledge of the facts and circumstances of the delay at issue, i.e. such statement is the result of a reasonable inquiry into the facts and circumstances of such delay. See 37 CFR 10.18(b) and Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. 53131, 53178 (October 10, 1997), 1203 Off. Gaz. Pat. Office 63, 103 (October 21, 1997.

A petition fee of $1540 has been charged to deposit account 23-1925.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop PETITIONS
Commissioner for Patents
Post Office Box 1450
Alexandria, VA 22313-1450

By hand: Customer Service Window
Mail Stop Petitions
Randolph Building
401 Dulany Street
Alexandria, VA 22314

By fax: (703) 872-9306
ATTN: Office of Petitions

Telephone inquiries concerning this decision should be directed to Karin Reichle at (571) 272-6051.

David Bucci
Petitions Examiner
Office of Petitions